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AT&T Communications of Maryland v. Comptroller of the Treasury: Responding to the Call for Judicial Activism and the Creation of Tax Shelters

I. INTRODUCTION

IN *AT&T COMMUNICATIONS OF MARYLAND v. COMPTROLLER OF THE TREASURY*,¹ the Court of Appeals of Maryland (“Court of Appeals”) considered whether AT&T owed more than \$5 million in uncollected use taxes for “1-900” interstate telephone calls made over its network between 1992 and 2001.² In light of *Quill Corp. v. North Dakota*,³ the Court of Appeals held that, under the Commerce Clause of the U.S. Constitution,⁴ AT&T was not obligated to collect use taxes from its in-state customers because AT&T acted as a common carrier of 1-900 telecommunications services and did not exceed the customary role of a common carrier.⁵ In reaching this conclusion, the Court of Appeals interpreted the term “common carrier” in a way that ignores: (1) the plain meaning of the term “common carrier” as expressed in the *Bellas Hess* and *Quill* decisions,⁶ (2) the Supreme Court’s sales and use tax jurisprudence,⁷ and (3) well-settled principles of judicial review of administrative action.⁸

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1. 950 A.2d 86 (Md. 2008).

2. *Id.* at 89, 90.

3. 504 U.S. 298 (1992). In *Quill*, the Court considered whether a state’s attempt to require an out-of-state mail-order house, which had neither outlets nor sales representatives in the state, to collect and pay use taxes on goods purchased within the state was constitutional. *Id.* at 301. The Court held that under the dormant Commerce Clause of the Constitution an out-of-state mail-order catalog vendor was exempt from collecting state use taxes because it did not have a physical presence in the state, such as a store, office, warehouse, or small sales force. *See id.* at 314–15, 318. In so holding, the Court established that in the absence of any action by Congress, vendors are free from state imposed duties to collect sales and use taxes if their only contacts with customers in the taxing state are by common carrier or the United States Postal Service. *See id.* at 315, 318. The Court of Appeals also relied on *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

4. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

5. *AT&T Commc’ns of Md.*, 950 A.2d at 99.

6. *See infra* Part V.A.

7. *See infra* Part V.B.

8. *See infra* Part V.C.

Instead, the Court of Appeals should have declared that AT&T is not a common carrier that is exempt from state taxation under *Quill* because Congress has already established in the Telecommunications Act of 1996⁹ that common carriers of telecommunications services, such as 1-900 services, are not exempt from state regulation.¹⁰ By failing to examine federal law to determine whether Congress has expressly exempted telecommunications providers from state regulation, the Court of Appeals created an unreasonable “common carrier exception” under *Quill* that finds little support in federal law and decided a complex policy issue that legislators and administrative law courts are better suited to resolve.¹¹

II. THE CASE

A. Factual Background

Telephone numbers that begin with the area code “900” allow consumers to purchase information or services such as psychic readings, sports scores, and weather information over the telephone.¹² Federal jurisdiction over the 900-services industry is split between the Federal Communications Commission (“FCC”), the Federal Trade Commission (“FTC”), and the U.S. Postal Service.¹³ In 1992, the Maryland General Assembly imposed a sales and use tax on 1-900 telecommunications services.¹⁴ Under Maryland tax law, vendors are obligated to collect use taxes from buyers.¹⁵ The vendor’s failure to do so results in the vendor assuming the tax liability of the buyer.¹⁶

Between 1992 and 2001, AT&T marketed and sold 1-900 numbers to out-of-state information vendors.¹⁷ AT&T’s connections with the sale of 1-900 numbers included: (1) contacting and entering into agreements with out-of-state information

9. Pub. L. No. 104-104, § 601(c)(1)–(2), 110 Stat. 56, 143–44 (1996) (codified in 47 U.S.C. § 152 note (2006)) (providing that the 1996 Act in no way supersedes any state or local law pertaining to taxation).

10. See *infra* Part V.D.

11. See *infra* Part VI.

12. See *AT&T Commc’ns of Md., Inc. v. Comptroller of the Treasury*, 932 A.2d 748, 750 (Md. Ct. Spec. App. 2007).

13. Nancy D. Galvez, *900 Numbers: A Controversial Industry*, 10 J. CONSUMER EDU. 1, 3–4 (1992).

The FCC monitors long-distance carriers and shares jurisdiction with states over billing and collection services. The FTC handles cases of interstate consumer fraud and deceptive practices and investigates complaints of consumers who were overcharged for 900-number services or did not receive the services advertised. Postal Service inspectors may investigate for fraud if any part of a 900-number call involves mail delivery.

Id. (citations omitted).

14. See MD. CODE ANN., TAX-GEN. § 11-101(m)(5) (West 2004). The statute provides: “Taxable service means . . . ‘900’, ‘976’, ‘915’, and other ‘900’ -type telecommunications service.” *Id.*

15. MD. CODE ANN., TAX-GEN. § 11-401(a) (West 2004). The Statute provides: “A vendor is a trustee for the State and is liable for the collection of the sales and use tax for and on account of the State.” *Id.*

16. MD. CODE ANN., TAX-GEN. § 11-601(c) (West 2004). The Statute provides: “Personal liability for the sales and use tax and for the interest and penalties of the tax extends to . . . a vendor . . . that . . . does not . . . collect from the buyer as required in § 11-403 of this title . . .” *Id.*

17. *AT&T Commc’ns of Md.*, 932 A.2d at 750–51.

vendors; (2) reviewing the vendor's advertisements and preamble messages for consumers; and (3) receiving funds for the transport of preamble messages over part of its network, dispute resolution services, and billing and collection services.¹⁸ On May 17, 2001, the Comptroller of Maryland ("the Comptroller") assessed AT&T over \$5 million in uncollected use taxes for 1-900 calls completed over its network between January 1, 1992 and February 28, 2001.¹⁹

B. Procedural History

On July 12, 2001, AT&T challenged its tax assessment before the Comptroller in a hearing.²⁰ The Comptroller affirmed the assessment on the grounds that AT&T was a "co-vendor of 900 telecommunications services along with the information providers, and, therefore, liable for remitting sales tax."²¹

On May 17, 2004, AT&T appealed the assessment before the Maryland Tax Court ("Tax Court").²² AT&T maintained that: (1) it was not a vendor or an agent of out-of-state information vendors; and (2) as a regulated provider of 1-900 numbers, it functioned as a common carrier that was exempt from tax collection and remittance responsibilities under the Commerce Clause of the Constitution.²³ On January 3, 2005, the Tax Court rejected each of AT&T's arguments and affirmed the assessment on the grounds that AT&T's "function greatly exceeded that of a common carrier" and that AT&T "acted with the [out-of-state information vendors] in every step of the transaction[s]."²⁴

On September 30, 2005, AT&T sought judicial review of its tax assessment in the Circuit Court for Baltimore City.²⁵ AT&T again argued that it neither sold nor delivered a taxable service in the state.²⁶ According to AT&T, the taxable service was the sale of information that the out-of-state information vendors provided to the ultimate customer; not the sale of 1-900 numbers to the public.²⁷ AT&T argued that it only sold "transport services" to out-of-state information vendors and did not sell information services to the ultimate customer.²⁸ The circuit court disagreed and concluded that: (1) AT&T was a vendor and a representative of the out-of-state information vendors in Maryland; and (2) the taxable service was the entire tele-

18. *Id.* at 750.

19. *Id.* at 750–51.

20. *Id.* at 751.

21. *Id.*

22. *AT&T Commc'ns of Md. v. Comptroller of the Treasury*, 950 A.2d 86, 90 (Md. 2008).

23. *Id.* at 90–91.

24. *Id.* at 91.

25. *See AT&T Commc'ns of Md., Inc. v. Comptroller of the Treasury*, 932 A.2d 748, 751 (Md. Ct. Spec. App. 2007).

26. *See AT&T Commc'ns of Md., Inc. v. Comptroller of the Treasury*, 2005 WL 5582024, at *6 (Md. Cir. Ct. Sept. 30, 2005).

27. *Id.* at *5–6.

28. *Id.* at *7.

communications service.²⁹ On appeal, the Court of Special Appeals of Maryland affirmed the circuit court and relied primarily on the findings of the Tax Court to conclude that AT&T “is liable for the sales tax because AT&T was . . . not merely a ‘common carrier’ of the 900 service, and . . . was a jointly-responsible agent of the out-of-state vendors.”³⁰

On December 13, 2007, the Court of Appeals granted certiorari³¹ to consider:

Whether, in light of the Supreme Court’s “bright-line” test in National Bellas Hess and Quill . . . , substantial nexus is created, thereby permitting Maryland to require a common carrier to collect a use tax on a sale from an out-of-state seller to a Maryland customer, when the out-of-state seller uses the common carrier to deliver its product (or service), and when the common carrier provides the out-of-state seller with services ancillary to, and in addition to, the delivery of the product (or service).³²

III. LEGAL BACKGROUND

In the seventeen years since the United States Supreme Court decided *Quill Corp. v. North Dakota*,³³ the constitutional limits of state sales and use taxes on interstate commerce have remained obscure and controversial.³⁴ Legislative bodies charged with implementing the Supreme Court’s decrees have struggled to establish tax policies that balance the government’s interest in raising tax revenues and the public’s interest in fostering business investment.³⁵ Part A of this section provides a brief overview of state sales and use taxes and focuses on how the Constitution restricts state taxing powers.³⁶ Part B traces the Supreme Court’s development of the “sufficient nexus” doctrine.³⁷ Part C provides a brief discussion of the standard of review of administrative action.³⁸ Finally, Part D examines state regulation of telecommunications carriers under the Telecommunications Act of 1996.³⁹

29. *Id.* at *5–7.

30. *AT&T Commc’ns of Md.*, 932 A.2d at 749–50.

31. *AT&T v. Comptroller*, 936 A.2d 852 (Md. 2007).

32. *AT&T Commc’ns of Md. v. Comptroller of the Treasury*, 950 A.2d 86, 92 (Md. 2008).

33. 504 U.S. 298 (1992).

34. In *Quill*, the Court characterized its own jurisprudence in the area of sales and use taxes as “something of a ‘quagmire’ . . . [that] ‘leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.’” *Id.* at 315–16 (quoting *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457–58 (1959)).

35. See *id.* at 318 n.11 (noting unenacted congressional legislation that would have overruled the *Bellas Hess* rule and permitted states to impose use tax collection obligations on out-of-state vendors with no physical presence in the taxing state).

36. See *infra* Part III.A.

37. See *infra* Part III.B.

38. See *infra* Part III.C.

39. See *infra* Part III.D.

A. *Constitutional Limitations on Sales and Use Taxes*

Sales and use taxes are an important source of revenue for state and local governments.⁴⁰ In Maryland, sales and use taxes account for the second largest source of state funding, accounting for \$3.7 billion in tax revenue and 31% of total revenues for the 2008 fiscal year.⁴¹ Under Maryland tax law, out-of-state vendors and their “agents” are required to collect and remit use taxes from the retail sale of taxable services to in-state consumers.⁴² However, the state’s power to impose sales and use taxes on out-of-state vendors is subject to two constitutional restraints: the Due Process Clause⁴³ and the Commerce Clause.⁴⁴

The Due Process Clause ensures fundamental fairness of government activity.⁴⁵ Under the Due Process Clause, a state cannot impose tax liabilities on out-of-state vendors unless the vendor can “reasonably anticipate being haled into court there”⁴⁶ based on its activities in the taxing state.⁴⁷ This fair-warning requirement is satisfied if the out-of-state vendor has engaged in “systematic and continuous activities” in the state, or has engaged in activities that are “purposefully directed” at residents of the state.⁴⁸ Accordingly, a state may impose taxes and exercise personal jurisdiction

40. A sales tax is defined as “[a] tax imposed on the sale of goods and services, usually measured as a percentage of their price.” BLACK’S LAW DICTIONARY 1498–99 (8th ed. 2004). On the other hand, a use tax is “[a] tax imposed on the use of certain goods that are bought outside the taxing authority’s jurisdiction. Use taxes are designed to discourage the purchase of products that are not subject to the sales tax.” *Id.* at 1499. See generally MD. CODE ANN., TAX-GEN. § 11-102(a) (West 2004). The Statute provides: “(a) *Sales and use tax imposed.*— Except as otherwise provided in this title, a tax is imposed on: (1) a retail sale in the State; and (2) a use, in the State, of tangible personal property or a taxable service.” *Id.*

41. COMPTROLLER OF MARYLAND, CONSOLIDATED REVENUE REPORT FISCAL YEAR 2008 13, 21 (2008), available at <http://www.marylandtaxes.com/finances/revenue/reports/consolidated/crr-08.pdf>.

42. See MD. CODE ANN., TAX-GEN. § 11-403(a)(1) (West 2008). The Statute provides, in pertinent part: “(a) *Duty of vendor to collect.*— Except as otherwise provided in this subtitle, a vendor shall collect the applicable sales and use tax from the buyer: (1) at the time that the sale is made” *Id.*

43. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

44. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

45. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (“Due process centrally concerns the fundamental fairness of governmental activity.”); see also *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (interpreting the Due Process Clause to require an out-of-state vendor to have “certain minimum contacts” in a state such that the state’s exercise of personal jurisdiction does not offend “traditional notions of fair play and substantial justice” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

46. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (holding that *Hustler Magazine, Inc.* could reasonably anticipate being haled into court in New Hampshire to defend against a libel action based on the contents of its magazine and its continuous and deliberate exploitation of the New Hampshire market).

47. See *Int’l Shoe Co.*, 326 U.S. at 317 (noting that an out-of-state vendor’s “[p]resence” in [a] state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . .”).

48. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478–80 (1985) (holding that the District Court of Florida’s exercise of personal jurisdiction over Burger King franchise owners located in Michigan did not offend the Due Process Clause because the out-of-state franchise owners deliberately reached out beyond Michigan by negotiating for the purchase of a long-term franchise with a Florida corporation and envisioning continuing contacts with Florida).

over an out-of-state vendor in conformity with the Due Process Clause if the out-of-state vendor conducts business by physically traveling into the state and purposely availing itself of the benefits of the state's laws and economic market.⁴⁹ Likewise, the inverse of this rule also holds true: states have no authority under the Due Process Clause to impose tax obligations or exercise personal jurisdiction over out-of-state vendors that only have random, fortuitous, or attenuated contacts in the state.⁵⁰

In contrast, the Commerce Clause is an express grant of power to Congress to regulate commerce among the states.⁵¹ Although the Commerce Clause says nothing about the protection of interstate commerce in the absence of congressional action,⁵² the Supreme Court has interpreted the clause to limit the authority of the states to impose taxes that unduly burden interstate commerce⁵³ or discriminate against interstate commerce.⁵⁴ The Supreme Court has commonly referred to this implicit limitation on state taxing power as the "dormant Commerce Clause."⁵⁵

Accordingly, the Due Process Clause and Commerce Clause reflect different constitutional concerns and policies.⁵⁶ On the one hand, the Due Process Clause reflects the constitutional concern over the exercise of personal jurisdiction over out-of-state defendants who have no meaningful contacts or conceivable connection with the taxing state.⁵⁷ The Commerce Clause, on the other hand, reflects the con-

49. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 276, 287-89 (1977) (upholding a state tax "for the privilege of . . . doing business" in Mississippi levied on an out-of-state corporation engaged in the business of transporting GMC vehicles by motor carrier).

50. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984) (holding that a Texas state court could not assert personal jurisdiction over a Colombian corporation in conformity with the Due Process Clause because the cause of action against the foreign corporation did not arise out of or relate to the corporation's activities in Texas); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (holding that the District Court of Oklahoma could not exercise personal jurisdiction over an out-of-state car dealership consistent with the Due Process Clause because the out-of-state vendor did not carry on any business activities in the state or avail itself of the privileges and benefits of Oklahoma law).

51. See *supra* note 44 and accompanying text.

52. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992).

53. See *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 665, 671 (1981) (holding that an Iowa statute that restricted the use of 65-foot freight trucks on its highways unconstitutionally burdened interstate commerce).

54. See *Philadelphia v. New Jersey*, 437 U.S. 617, 618, 629 (1978) (holding that a New Jersey law that prohibited landfill sites from accepting solid or liquid waste that originated outside the territorial limits of the state unconstitutionally discriminated against interstate commerce).

55. The word "dormant" in connection with the Commerce Clause originated in the dicta of Chief Justice John Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). Chief Justice Marshall wrote that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." *Id.* Later, in *Willson v. Black-Bird Creek Marsh Co.*, Chief Justice Marshall wrote "[w]e do not think, that the act empowering the Black Bird Creek Marsh company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." 27 U.S. (2 Pet.) 245, 252 (1829) (emphasis added).

56. See *Quill*, 504 U.S. at 312.

57. *Id.*

stitutional concern over state regulations that pose threats to the national economy.⁵⁸

B. *The Development of the “Sufficient Nexus” Doctrine*

Before the 1992 *Quill* decision, the Supreme Court’s sales and use tax jurisprudence did not distinguish between the Due Process Clause and the Commerce Clause to limit state taxation of interstate commerce.⁵⁹ In *Miller Bros. Co. v. Maryland*,⁶⁰ a case involving a state that imposed use tax collection obligations on an out-of-state vendor with no physical presence in the state, the Supreme Court established that the Due Process Clause required “some definite link, some minimum connection, between a state and the person, property[,] or transaction it seeks to tax.”⁶¹ Subsequently, in *Scripto, Inc. v. Carson*,⁶² the Supreme Court adopted the term “nexus” to describe the degree of “sufficient contacts or connections” an out-of-state vendor must have in a state before that state can constitutionally impose use tax collection obligations on the out-of-state vendor under the Due Process Clause and Commerce Clause.⁶³

Between 1954 and 1977, *Miller Bros.*,⁶⁴ *Scripto*,⁶⁵ *National Bellas Hess v. Department of Revenue*,⁶⁶ and *National Geographic v. California Board of Equalization*,⁶⁷ all

58. *Id.*

59. *See id.* at 305–06.

60. 347 U.S. 340 (1954).

61. *See id.* at 341, 344–45 (holding that, under the Due Process Clause, Maryland could not impose a use tax collection obligation on an out-of-state vendor that sold goods to Maryland residents directly out of its store in Delaware because the out-of-state vendor, by its acts and course of dealing, did not subject itself to Maryland’s taxing power).

62. 362 U.S. 207 (1960).

63. *See id.* at 208, 210–11 (“There must be . . . ‘some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’ We believe that such a *nexus* is present here.” (emphasis added)).

64. In *Miller Bros.*, the Court held that the following factors did not establish a sufficient nexus for Maryland to impose a use tax collection on an out-of-state vendor: (1) advertisements, not especially directed to Maryland residents, in newspapers and radio stations located in Delaware but reached Maryland residents; (2) occasional sales flyers that the out-of-state vendor mailed to all of its former customers, including its customers in Maryland; (3) the delivery of some purchases to common carriers consigned to Maryland addresses; and (4) the delivery of some purchases to Maryland addresses with its own shipping trucks. *See Miller*, 347 U.S. at 341–42.

65. In *Scripto*, the Court concluded that a Georgia vendor—who employed ten “advertising specialty brokers” or “wholesalers” who were residents of Florida and received compensation on a commission basis through continuous solicitation of Florida customers—created a sufficient nexus for Florida to impose a use tax collection obligation on the out-of-state vendor in conformity with the Commerce Clause and Due Process Clause. *See Scripto*, 362 U.S. at 208–09, 211–12. The Court distinguished *Miller Bros.* on the grounds that in *Miller*, the out-of-state vendor had no solicitors in Maryland, did not exploit Maryland’s consumer market, and did not engage in regular systematic displaying of its products by catalogs or samples. *Id.* at 212.

66. 386 U.S. 753 (1967). In *Bellas Hess*, the Court held that a Missouri-based mail-order catalog vendor did not establish a sufficient nexus in Illinois by mailing a catalog to Illinois residents twice a year and occasionally mailing advertising flyers to past and potential customers in Illinois. *Id.* at 754, 760.

67. 430 U.S. 551 (1977). In *National Geographic*, the Court held that an out-of-state mail-order vendor established a sufficient nexus in California by maintaining two offices in California to solicit advertising for the

clarified that a “sufficient nexus” to impose use tax collection obligations on out-of-state vendors in conformity with the Due Process Clause and Commerce Clause required an out-of-state vendor to maintain a permanent physical presence in the taxing state.⁶⁸ In *Bellas Hess*, the Supreme Court explained that states could not constitutionally impose use tax collection obligations on the activities of out-of-state mail-order catalog vendors because the state did not have a “legitimate claim to impose ‘a fair share of the cost of the local government.’”⁶⁹ Furthermore, the Supreme Court refused to entangle mail-order catalog vendors with the burdensome and complicated efforts to comply with the different tax regulations of various jurisdictions since it would unduly burden interstate commerce.⁷⁰

Ten years after deciding *Bellas Hess*, in 1977, the Supreme Court reversed its long-standing view that interstate commerce was immune from state taxation in the *Complete Auto* decision.⁷¹ The *Complete Auto* case involved a state imposing a “business privilege tax”⁷² on an out-of-state vendor that transported motor vehicles by motor carrier into the state.⁷³ After noting that the out-of-state vendor did not allege that its activities did not create a “sufficient nexus” to justify the tax, the Supreme Court indicated that it would affirm a state tax if: (1) it was related to services provided by the state; (2) it did not discriminate against interstate commerce; and (3) it did not present a danger of subjecting the out-of-state vendor to multiple taxation.⁷⁴ The Supreme Court emphasized that interstate commerce was not immune from state taxation and must pay its fair share of state taxes even though it increases the cost of doing business.⁷⁵

In accordance with its decision in *Complete Auto*, the Supreme Court affirmed that interstate commerce was not immune from state taxation in *Goldberg v. Sweet*.⁷⁶ In *Goldberg*, the Supreme Court considered whether a state tax on interstate telephone calls, originated or received by a person in the state, violated the dormant Commerce Clause.⁷⁷ To make this determination, the Supreme Court ana-

out-of-state company’s magazine business, an activity that was unrelated to the out-of-state vendor’s mail-order business for the sale of maps, atlases, globes, and books. *See id.* at 552, 562. The Court explained that the out-of-state vendor had a “substantial presence” in California because its two offices generated approximately \$1 million in annual advertising sales. *See id.* at 556, 560.

68. *See supra* notes 64–67 and accompanying text.

69. *See Nat’l Bellas Hess*, 386 U.S. at 753–54, 759–60.

70. *Id.* at 759–60.

71. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288–89 (1977) (overruling *Spector Motor Serv. v. O’Connor*, 340 U.S. 602 (1951)).

72. A privilege tax is defined as “[a] tax on the privilege of carrying on a business or occupation for which a license or franchise is required.” BLACK’S LAW DICTIONARY 1498 (8th ed. 2004).

73. *Complete Auto*, 430 U.S. at 275–76.

74. *Id.* at 287–88.

75. *Id.* at 288.

76. 488 U.S. 252, 254 (1989).

77. *See id.* at 254, 256. In 1985, Section 4 of the Telecommunications Excise Tax Act provided, in relevant part:

lyzed the tax under *Complete Auto's* four-part test.⁷⁸ The Supreme Court first considered whether the tax was applied to an activity with a “substantial nexus” with the state, and noted that all the parties agreed that Illinois had a “sufficient nexus” to justify the tax.⁷⁹ According to the Supreme Court, only two states had a sufficient nexus to tax an interstate telephone call: (1) the state where the phone call originates or terminates and is charged to a service address in that state; and (2) the state where the phone call originates or terminates and is billed or paid within that state.⁸⁰ After determining that the state had a substantial nexus with the interstate telephone calls reached by the tax, the Supreme Court subsequently concluded that the tax was fairly apportioned,⁸¹ did not discriminate against interstate commerce,⁸² and was fairly related to services that the state provided to the taxpayer.⁸³ Accordingly, the Supreme Court concluded that a state tax on interstate telephone calls did not offend the Commerce Clause.⁸⁴

Twenty-five years after deciding *Bellas Hess*, in 1992, the Supreme Court reconsidered the relevance of having a bright-line rule to establish a sufficient nexus for

A tax is imposed upon the act or privilege of originating in this State or receiving in this State interstate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person.

Id. at 256 n.5.

78. *Id.* at 257 (stating that a tax on interstate commerce does not offend the Commerce Clause if it “[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State”).

79. *Id.* at 260 (“As all parties agree that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act . . .”).

80. *Id.* at 263. Further, the Court expressed “doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call.” *Id.*

81. To determine whether the tax was fairly apportioned, the Supreme Court examined whether the tax was internally and externally consistent. *Id.* at 261. The Court concluded that the tax was internally consistent because only one state would tax each interstate telephone call if every state imposed the same tax on an in-state service address. *Id.* Additionally, the Supreme Court concluded that the tax was externally consistent because the tax reasonably reflected the in-state component of the activity being taxed. *Id.* at 262. The Court explained that the tax had many characteristics of a sales tax, because it was assessed on the individual consumer for the retail purchase of an interstate telephone call and was collected by the retailer. *Id.* Although the Court recognized that the tax posed a risk of multiple taxation for taxpayers with service addresses and billing locations in different states, the Court concluded that the tax’s credit provision avoided this limited possibility. *Id.* at 264. As such, the Supreme Court held that the tax was fairly apportioned. *Id.* at 265.

82. The Supreme Court concluded that the tax did not impose a discriminatory tax on interstate commerce because the state’s flat tax of 5% on the gross charge on interstate telephone calls originating from within the state did not favor intrastate commerce at the expense of interstate commerce. *Id.* at 265–66. The Court emphasized that “[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes.” *Id.* at 266.

83. The Supreme Court had little difficulty concluding that the tax was fairly related to the benefits received by Illinois telephone consumers. *Id.* at 267. The Court explained that the benefits that Illinois provided to its citizens were not limited to only the telecommunications equipment used during each interstate telephone call. *Id.* Instead, the Court reasoned that interstate commerce must contribute its fair share to the cost incurred by the state to provide all governmental services, including the cost of other telephone service and police and fire protection. *Id.*

84. *Id.* at 267; *cf. id.* at 271 (Scalia, J., concurring) (“Because the Illinois Telecommunications Excise Tax is assessed upon intrastate and interstate calls at precisely the same rate, it poses no constitutional difficulty.”).

state taxation in *Quill Corp. v. North Dakota*.⁸⁵ As in *Bellas Hess*, the *Quill* case involved a state that imposed a use tax on an out-of-state mail-order catalog vendor.⁸⁶ Instead of adhering to precedent, the North Dakota Supreme Court concluded that the Commerce Clause no longer mandated an out-of-state vendor to have a physical presence within a state in order to create a sufficient nexus for taxation and subject itself to a duty to collect and remit state use taxes.⁸⁷ The North Dakota Supreme Court noted that advances in technology had transformed the mail-order business “from a relatively inconsequential market niche” with sales of “\$2.4 billion in 1967” into a “goliath” with annual sales of “\$183.3 billion in 1989.”⁸⁸ In addition, the North Dakota Supreme Court explained that advances in technology greatly eased the burdensome and complicated efforts to comply with the tax obligations of various jurisdictions.⁸⁹ Based on these findings, the North Dakota Supreme Court held that *Quill*’s economic presence in the state created a sufficient nexus to require *Quill* to collect state use taxes.⁹⁰

On certiorari, the United States Supreme Court reversed and remanded the North Dakota Supreme Court’s decision, and reaffirmed *Bellas Hess* in part, by holding that an out-of-state vendor creates a “sufficient nexus” under the Commerce Clause by having a physical presence within the taxing state.⁹¹ The Supreme Court explained that in the area of sales and use taxes, the Due Process Clause and Commerce Clause were analytically distinct because they reflect different constitutional concerns and policies.⁹² According to the Supreme Court, an out-of-state vendor could have sufficient “minimum contacts” to subject itself to a state’s *in personam* jurisdiction in conformity with the Due Process Clause, but not have a “sufficient nexus” to subject itself to a state’s tax authority under the Commerce Clause.⁹³ The Supreme Court grounded this legal distinction on the fact that the Constitution grants Congress the ultimate power to authorize state taxes that burden interstate commerce under the Commerce Clause, but does not similarly grant

85. 504 U.S. 298 (1992).

86. *Id.* at 301. *Quill* sold close to \$1 million in sales to about 3,000 customers and purposefully directed its advertisements through catalogs, flyers, national periodicals, and telephone calls. *Id.* at 302.

87. The Supreme Court of North Dakota explained that “‘tremendous social, economic, commercial, and legal innovations’” had rendered the *Bellas Hess* holding obsolete. *Id.* (quoting *State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991)).

88. See *Quill*, 470 N.W.2d at 208–09.

89. *Id.* at 215.

90. *Id.* at 219.

91. See *Quill*, 504 U.S. at 311, 317 (“*Bellas Hess* . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the commerce Clause.”). *But see id.* at 328 (White, J., concurring in part and dissenting in part) (concluding that *Quill*’s economic presence in North Dakota established a sufficient nexus under the Commerce Clause because *Quill* derived numerous commercial benefits from state banking institutions that supported its credit transactions, waste disposal services, enforcement of consumer protection laws, and a climate of consumer confidence to bolster the reputation of mail-order houses).

92. *Id.* at 305.

93. *Id.* at 307, 313.

Congress the ultimate power to authorize violations of due process under the Due Process Clause.⁹⁴

C. *Judicial Review of Administrative Decisions: An Overview*

Taxpayers must resolve challenges to state taxes on constitutional grounds in state forums.⁹⁵ Most state tax disputes are resolved by state tax courts, independent quasi-judicial administrative agencies within the executive branch of state governments, which decide cases after making findings of fact and conclusions of law.⁹⁶ In Maryland, final determinations of the Tax Court are subject to judicial review in the circuit courts and the Court of Appeals.⁹⁷

On appeal, the scope of judicial review of an administrative decision is narrow and limited to determining whether there is substantial evidence in the record to support the agency's findings and conclusions, and if the administrative decision is premised upon an erroneous conclusion of law.⁹⁸ A court must accord a degree of deference to an agency's ruling because it implicates complex public policy preferences that agencies are better suited to resolve.⁹⁹

On judicial review of state taxes under the dormant Commerce Clause, the Supreme Court has stated that appellate courts must first address the threshold question of whether Congress has affirmatively "acted or purported to act" pursuant to its power to regulate interstate commerce.¹⁰⁰ Under the Supremacy Clause of the

94. *Id.* at 305, 318.

95. Elizabeth Buroker Coffin, *The Case for a State Tax Court*, 8 ST. & LOC. TAX L. 63, 68 (2003).

Taxpayers with state tax challenges must resolve them in state forums. Under deliberate Congressional design, the states must provide tribunals and processes to enforce the rights of taxpayers, protect them from the unconstitutional or unlawful imposition of taxes, and create for them fair and accessible procedures by which they can assert their positions.

Id.

96. See *Shell Oil Co. v. Supervisor of Assessments*, 343 A.2d 521, 522, 527 (Md. 1975) ("[T]he Legislature has delegated certain duties to the Tax Court, the performance of which requires it to make factual determinations and adjudicate disputes. The Tax Court, therefore, can be said to act in a quasi-judicial capacity.").

97. "Henceforth, judicial review of Tax Court cases shall be in the circuit courts of the counties or the Baltimore City Court . . ." See *id.* at 523 (holding that the Maryland Constitution does not grant the Court of Appeals of Maryland original jurisdiction to review decisions from the Maryland Tax Court on appeal); MD. CODE ANN., STATE GOV'T §§ 10-222(a) and 10-223(b) (West 2004).

98. See *Md. State Dep't of Educ. v. Shoop*, 704 A.2d 499, 505 (Md. Ct. Spec. App. 1981) (quoting *United Parcel v. People's Counsel*, 650 A.2d 226, 230 (Md. 1994)).

99. "Upon appellate review, courts bestow special favor on an agency's interpretation of its own regulation. Recognizing an agency's superior ability to understand its own rules and regulations, a 'court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken.'" *Dep't of Health & Mental Hygiene v. Reeders Mem'l. Home, Inc.*, 586 A.2d 1295, 1297-98 (Md. Ct. Spec. App. 1991) (quoting *Bullock v. Pelham Wood Apartments*, 390 A.2d 1119, 1124 (Md. 1978)).

100. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982); see also *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981) ("[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945))).

U.S. Constitution, Congress has the power to preempt and supersede any state law.¹⁰¹ Accordingly, the Supreme Court has explained that appellate courts may only review administrative decisions that are “contrary to clear congressional intent.”¹⁰² If Congress has not acted, courts are the “final arbiters under the Commerce Clause” in order to protect the free flow of interstate commerce.¹⁰³ On the other hand, if congressional intent is clear, courts are no longer needed to prevent the states from burdening interstate commerce.¹⁰⁴ Once Congress has acted pursuant to its power to regulate interstate commerce, a court must give effect to the unambiguously expressed intent of Congress and no longer has authority to review state taxes under the dormant Commerce Clause.¹⁰⁵ If federal law is silent or ambiguous with respect to the specific legal question at issue, on judicial review an appellate court must determine whether the agency’s construction of a state tax statute results in an erroneous judgment in light of congressional intent and existing federal law.¹⁰⁶

D. State Regulation of Telecommunications Carriers Under the Telecommunications Act of 1996

In the Communications Act of 1934,¹⁰⁷ Congress established a dual system of state and federal regulation of telecommunications providers.¹⁰⁸ To this end, Congress created the FCC in Section 1 of the 1934 Act and granted it exclusive authority to regulate interstate telecommunications,¹⁰⁹ and in Section 2(b), limited the FCC’s jurisdiction by denying it power to regulate intrastate telecommunications services.¹¹⁰ While the 1934 Act would seem to neatly divide all types of telecommunications services into two separate regulatory schemes, advances in technology have blurred the lines of where exclusive state jurisdiction over intrastate matters ends and exclusive federal jurisdiction over interstate matters begins.¹¹¹

101. See U.S. CONST. art. IV, § 2.

102. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Id. at 843 n.9 (citations omitted).

103. See *Chevron*, 467 U.S. at 842–43; *Merrion*, 455 U.S. at 154–55.

104. See *Chevron*, 467 U.S. at 842–43.

105. See *id.*; *Merrion*, 455 U.S. at 154–55.

106. See *Chevron*, 467 U.S. at 843.

107. Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

108. See 74 AM. JUR. 2D *Telecommunications* § 13 (2001).

109. 47 U.S.C. § 151 (2006).

110. “[N]othing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service” 47 U.S.C. § 152(b) (2006).

111. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 360 (1986).

Congress subsequently amended the 1934 Act with the Telecommunications Act of 1996.¹¹² With the 1996 Act, Congress sought to promote competition in the telecommunications industry by reducing regulation and encouraging the rapid deployment of new technologies.¹¹³ To achieve these goals, the 1996 Act prevents state and local authorities from raising barriers to entry that prohibit the ability of any entity to provide any interstate or intrastate telecommunications services.¹¹⁴ However, nothing in the 1996 Act prohibits states from imposing regulations and taxes on a competitively neutral basis.¹¹⁵ In Section 601(c)(2) of the 1996 Act, Congress expressly provides that:

*“[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation”*¹¹⁶

As such, the 1996 Act does not expressly preempt states from imposing sales and use taxes on telecommunications providers that provide both intrastate and interstate telecommunications services.¹¹⁷

The Supreme Court explained the scope of state and federal regulation under the 1996 Act in *National Cable and Telecommunications Ass’n v. Brand X Internet Services*,¹¹⁸ where it stated that the 1996 Act “regulates telecommunications carriers, but not information service providers”¹¹⁹ In *Brand X Internet Services*, the Supreme Court considered whether the FCC lawfully concluded that cable companies that sold broadband Internet service did not provide a “telecommunications service,” and were thus exempt from state and federal common-carrier regulation under the Act.¹²⁰ The Supreme Court explained that the 1996 Act’s definitions of “telecommunications service”¹²¹ and “information service”¹²² were analogous to the FCC’s traditional distinction between “basic”¹²³ and “enhanced”¹²⁴ services estab-

112. See Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

113. *Id.*

114. See 86 C.J.S. *Telecommunications* § 4 (2006).

115. See *id.*

116. 47 U.S.C. § 152 note (2006).

117. See *id.*

118. 545 U.S. 967 (2005).

119. *Id.* at 975.

120. *Id.* at 973–74.

121. “Telecommunications service” is “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.” Pub. L. No. 104-104, § 3, 110 Stat. 56, 60 (1996) (codified as 47 U.S.C. § 153(46) (2006)). “Telecommunications” is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *Id.* (codified as 47 U.S.C. § 153(43) (2006)). “Telecommunications carrier[s]” are defined as “provider[s] of telecommunications services.” *Id.* (codified as 47 U.S.C. § 153(44) (2006)).

122. “Information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” Pub. L. No. 104-104, § 3, 110 Stat. 56, 59 (1996) (codified as 47 U.S.C. § 153(20) (2006)).

123. The FCC defined a “basic service” as:

lished in the late 1970's.¹²⁵ Accordingly, the Supreme Court agreed with the FCC that broadband cable modem Internet service was an "information service" because:

*[I]t provides consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications. That service enables users, for example, to browse the World Wide Web, to transfer files . . . available on the Internet . . . and to access e-mail and Usenet newsgroups All of these features . . . were part of the information service that cable companies provide consumers.*¹²⁶

At the same time, the Supreme Court agreed with the FCC that cable modem service was not a "telecommunications service" because:

*[Although] . . . cable companies[, like all information-service providers,] use "telecommunications" to provide consumers with Internet service; cable companies provide such service via the high-speed wire that transmits signals to and from an end user's computer Seen from the consumer's point of view . . . cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access The wire is used, in other words, to access the World Wide Web, newsgroups, and so forth, rather than "transparently" to transmit and receive ordinary-language messages without computer processing or storage of the message . . . [Therefore,] cable modem service is not a "stand-alone," transparent offering of telecommunications.*¹²⁷

[A] pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." By "pure" or "transparent" transmission, the Commission meant a communications path that enabled the consumer to transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network—such as via a telephone or a facsimile. Basic service was subject to common-carrier regulation.

Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005) (citations omitted).

124. The FCC defined an "enhanced service" as:

[A] service in which "computer processing applications were used to act on the content, code, protocol, and other aspects of the subscriber's information," such as voice and data storage services By contrast to basic service, the Commission decided not to subject providers of enhanced service, even enhanced service offered via transmission wires, to Title II common-carrier regulation. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving, competitive market" in which they were offered.

Id. at 976–77 (citations omitted).

125. *Id.* at 977.

126. *Id.* at 987 (citations omitted).

127. *Id.* at 987–88 (citations omitted).

Based on these findings, the Supreme Court upheld the FCC's ruling that cable modem Internet services were "information services" that were exempt from state and federal common-carrier regulation under the 1996 Act.¹²⁸

IV. THE COURT'S REASONING

In *AT&T Communications of Maryland v. Comptroller of the Treasury*,¹²⁹ the Court of Appeals concluded, in a unanimous decision, that AT&T was not responsible for paying more than \$5 million in uncollected use taxes for 1-900 calls made over its network between 1992 and 2001.¹³⁰ To reach this conclusion, the Court of Appeals considered three questions: (1) whether it could review the decision of the Maryland Tax Court;¹³¹ (2) whether AT&T qualified as a "common carrier" within the meaning of *Bellas Hess* and *Quill*;¹³² and (3) whether AT&T acted outside of the scope of an ordinary common carrier.¹³³

With regard to the first question, the Court of Appeals concluded that it could review the Maryland Tax Court's decision because it only involved a question of law.¹³⁴ The Court of Appeals disagreed with the Comptroller that the Tax Court's decision implicated the exercise of the agency's expertise and was therefore entitled to deference.¹³⁵ Instead, the Court of Appeals agreed with AT&T that determining whether AT&T was a common carrier within the meaning of *Bellas Hess* and *Quill* only involved a question of law.¹³⁶

With regard to the second question, the Court of Appeals concluded that AT&T could be reasonably characterized as a common carrier.¹³⁷ The Court of Appeals defined the term "common carrier" based on Maryland case law that described common carriers as transporters of property that serve all who apply.¹³⁸ The Court of Appeals agreed with the Court of Special Appeals that "courts have long held that under many circumstances, telephone (and) telegraph companies are common

128. *Id.* at 986.

129. 950 A.2d 86 (Md. 2008).

130. *Id.* at 99.

131. *Id.* at 91–92.

132. *Id.* at 94–95.

133. *Id.*

134. *Id.* at 92.

135. *Id.*

136. *Id.*

137. *Id.* at 95.

138. Carriers, as transporters of property or persons from one place to another, ordinarily are classified as 'private' or 'common.' [T]he test generally recognized for distinguishing a private from a common carrier is that a common carrier is obliged, within the limits of its ability, to serve all who apply, while a private carrier is under no such obligation.

Id. at 95 (quoting *Rutledge Co-op. Ass'n v. Baughman*, 138 A. 29, 31 (Md. 1927)) (internal quotation marks omitted).

carriers of messages.¹³⁹ The Court of Appeals also based its conclusion on *F.C.C. v. Midwest Video Corp.*,¹⁴⁰ where the Supreme Court stated:

*A common-carrier service in the communications context is one that makes a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.*¹⁴¹

By adopting this definition to the term “common carrier,” the Court of Appeals concluded that AT&T could be reasonably characterized as a common carrier of 1-900 telecommunications services because it offered 1-900 numbers to the public at fixed prices.¹⁴²

Finally, with regard to the third question, the Court of Appeals concluded that AT&T did not exceed the customary role of a common carrier.¹⁴³ Although all of the lower courts found that AT&T’s substantial involvement with the 1-900 calls at issue exceeded the role of a common carrier, the Court of Appeals concluded that AT&T only acted in compliance with its role as an FCC regulatory compliance overseer.¹⁴⁴ As a result, the Court of Appeals held that AT&T acted as a common carrier of 1-900 telecommunications services, and therefore the Comptroller could not obligate AT&T to collect use taxes for the interstate 1-900 calls completed over its network without violating the Commerce Clause of the Constitution.¹⁴⁵

V. ANALYSIS

In *AT&T Communications*, the Court of Appeals became the first state court to exempt telecommunications providers from state use tax collection obligations as “common carriers” under *Quill Corp. v. North Dakota*.¹⁴⁶ Part A of this section

139. *Id.* (quoting *AT&T Commc’ns of Md. v. Comptroller of the Treasury*, 932 A.2d 748, 754 (Md. Ct. Spec. App. 2007)) (internal quotation marks omitted).

140. 440 U.S. 689 (1979).

141. *Id.* at 701.

142. *See AT&T Commc’ns of Md.*, 950 A.2d at 95.

143. *Id.* at 96.

144. *Id.* 97–99.

145. *Id.* at 99.

146. In other state courts, the determination of whether an out-of-state vendor has subjected itself to a state’s use tax collection laws under *Quill* has turned on whether the activities of the out-of-state vendor created a “substantial nexus” with the taxing state, rather than on the interpretation of the term “common carrier.” *See Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176, 192–93 (Cal. Ct. App. 2005) (upholding a state tax on Borders Books Online because its sister organization, Borders Books and Music, operated several stores in the state); *In re Appeal of InterCard, Inc.*, 14 P.3d 1111, 1122–23 (Kan. 2000) (holding that an out-of-state vendor that sent technicians into Kansas eleven times during a 48-month audit period to install electronic card readers for its customer’s photocopiers did not establish a sufficient nexus); *Scholastic Book Clubs v. State*, 567 N.W.2d 692, 695–96 (Mich. 1997) (refusing to find an implied agency relationship between Michigan school teachers and Scholastic Books); *Dep’t of Revenue v. Share Int’l, Inc.*, 676 So. 2d 1362, 1363 (Fla. 1996) (concluding that an out-of-state vendor that sent its employees to a medical

examines how the Court of Appeals unconstitutionally intruded on the role of the Maryland General Assembly by adopting a definition of the term “common carrier” that conflicts with the term’s plain meaning in the context of sales and use taxes.¹⁴⁷ Part B of this section examines how the Court of Appeals’s construction of *Quill*’s “common carrier exception” is inapposite to the Supreme Court’s sales and use tax jurisprudence.¹⁴⁸ Part C of this section analyzes how the Court of Appeals committed legal error by ignoring the Supreme Court’s basic framework for analyzing administrative decisions.¹⁴⁹ Finally, Part D of this section analyzes how the Court of Appeals should have concluded that AT&T is not a common carrier within the meaning of *Quill* because Congress has already declared in the Telecommunications Act of 1996 that common carriers of basic telecommunications services, such as 1-900 services, are not exempt from state taxation.¹⁵⁰

A. *The Court of Appeals’s Definition of the Term “Common Carrier” Conflicts with the Term’s Plain Meaning*

The Court of Appeals committed a basic legal error by adopting a judicial definition for the term “common carrier” that conflicts with the “normal, plain meaning”¹⁵¹ of the term as expressed in the Supreme Court’s opinions in *Bellas Hess* and *Quill*.¹⁵² Under Maryland law, “when the meaning of a word or phrase in a constitutional or statutory provision is perfectly clear, [courts] will not give that word or phrase a different meaning than is plainly understood.”¹⁵³ In *Bellas Hess* and *Quill*, the Supreme Court established that out-of-state vendors are free from state sales and use taxes if their only contacts with customers in the state are by common carrier or the U.S. Postal Service.¹⁵⁴

Although the Supreme Court did not define the term “common carrier,” the factual context of both cases established that the term “common carrier” described an independent third-party transportation vessel that had to physically travel into a

exhibition in the state for three days each year, during a five-year period, did not create a nexus with the state); *In re Tax Appeal of Scholastic Book Clubs, Inc.*, 920 P.2d 947, 958 (Kan. 1996) (upholding a state tax on Scholastic Books, a mail-order book seller, because school teachers acted as Scholastic’s sales agents by receiving a commission for recommending books and collecting student orders); *Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954, 961 (N.Y. 1995) (holding that out-of-state seller created a substantial nexus by deriving \$1 million to \$1.5 million in annual sales with employees that visited the state twelve times over a three-year audit period).

147. See *infra* Part V.A.

148. See *infra* Part V.B.

149. See *infra* Part V.C.

150. See *infra* Part V.D.

151. See *Lamone v. Capozzi*, 912 A.2d 674, 685 (Md. 2006).

152. The Court of Appeals concluded that AT&T could be reasonably characterized as a “common-carrier” within the context of sales and use taxes because, under Maryland law, common carriers are “transporters of property” that “serve all who apply” and “courts have long held that under many circumstances, telephone (and) telegraph companies are common carriers of messages.” See *AT&T Commc’ns of Md. v. Comptroller of the Treasury*, 950 A.2d 86, 94–96 (2008) (citation omitted).

153. See *Lamone*, 912 A.2d at 685.

154. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992).

state to deliver an out-of-state vendor's goods.¹⁵⁵ This plain meaning of the term is supported by Black's Law Dictionary, which defines "common carrier" as "[a] commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee."¹⁵⁶ Furthermore, no state court or Supreme Court decision has indicated that the term "common carrier" should be broadly construed in the context of sales and use taxes.¹⁵⁷

By broadly defining the term common carrier as "transporters of property" that "serve all who apply," the Court of Appeals gave the term "common carrier" a different meaning than is plainly understood in the Supreme Court's opinions in *Bellas Hess* and *Quill*.¹⁵⁸ As a result, under the Court of Appeals's interpretation of the term "common carrier," many other heavily regulated businesses that operate in interstate and intrastate commerce can potentially avoid state tax collection obligations by arguing that their activities are sufficiently analogous to the activities of the U.S. Postal Service and shipping companies.¹⁵⁹ Outside of the context of sales and use taxes, the Supreme Court has previously stated that oil refining companies that operate pipelines services are common carriers.¹⁶⁰ Federal courts have also stated that cruise ships are common carriers.¹⁶¹ Even operators of amusement parks can potentially avoid state sales and use taxes by plausibly arguing that they are

155. See *id.* at 302.

156. BLACK'S LAW DICTIONARY 226 (8th ed. 2004).

157. For state court opinions interpreting *Quill*, see *supra* note 146 and accompanying text. Since 1992, only ten Supreme Court opinions have cited to *Quill v. North Dakota* and no case has indicated that entities other than interstate freight transportation vessels qualify as "common carriers" that are exempt from state use tax collection obligations under *Quill*. See *Polar Tankers, Inc. v. City of Valdez, Alaska*, 129 S. Ct. 2277 (2009) (striking down city tax that exclusively targeted large oil tankers); *MeadWestvaco Corp. v. Illinois Dep't. of Revenue*, 128 S. Ct. 1498 (2008) (addressing the "unitary business" rule); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (striking down state exemption of property tax for charitable institutions); *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (upholding state exemption of sales and use taxes for local sellers, but not out-of-state sellers); *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 845 (1996) (striking down "generally applicable, nondiscriminatory federal tax on goods in export transit"); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) (upholding state sales tax on purchase of bus tickets to out-of-state destinations); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (upholding California's worldwide-combined reporting requirement for corporate franchise tax calculation); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993) (upholding state sales tax on lease of cargo containers within the state for exclusive use in international shipping); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (deciding constitutionality of city ordinance); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768 (1992) (taxing non-domiciliary corporation).

158. See *AT&T Commc'ns of Md. v. Comptroller of the Treasury*, 950 A.2d 86, 94–95 (Md. 2008). Unlike the U.S. Postal Service or shipping companies, AT&T does not deliver tangible goods and does not have a temporary presence in a state. See *Goldberg v. Sweet*, 488 U.S. 252, 264 n.14 (1989) (explaining that many of its "Commerce Clause decisions concern state taxes on the movement of goods or the instrumentalities of interstate transportation," such as trucks, cargo containers, motor carriers, oil pipelines, and buses).

159. See *supra* note 157 and accompanying text.

160. See *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 101–02 (1975) (stating that an oil refining company that operates interstate pipeline systems is a common carrier of petroleum products that is not exempt from state privilege taxes under the Commerce Clause).

161. See *Am. Ass'n of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.*, 911 F.2d 786, 789 (D.C. Cir. 1990) (holding that cruise ships are common carriers under the Shipping Act).

common carriers of persons who travel in interstate commerce.¹⁶² Given that the Supreme Court did not foresee the development of the Internet and the rapid spread of personal computers when it decided *Quill* in 1992,¹⁶³ the Court of Appeals should have adhered to the plain meaning of the term “common carrier” and concluded AT&T was not a “common carrier” of 1-900 telecommunications services within the context of sales and use taxes.¹⁶⁴

B. The Court of Appeals’s Construction of Quill’s Common Carrier Exception Is Inapposite to the Supreme Court’s Sales and Use Tax Jurisprudence

By not adhering to the plain meaning of the term “common carrier,” the Court of Appeals’s legal reasoning results in a conclusion that is inapposite to the Supreme Court’s rulings in *Scripto v. Carson*¹⁶⁵ and *Goldberg v. Sweet*.¹⁶⁶ In *AT&T Communications of Maryland*, the Court of Appeals reasoned that a telecommunications provider was exempt from sales and use taxes under *Quill* because transmitting interstate telephone calls was analogous to shipping goods via the U.S. Postal Service or common carrier.¹⁶⁷ This reasoning by analogy leads to outcomes that conflict with the Supreme Court’s ruling in *Scripto*, where it established that out-of-state vendors are subject to state sales and use taxes if they employ “independent contractors” in the state.¹⁶⁸

In many ways, AT&T’s activities with the 1-900 calls at issue resemble the activities of the independent contractors that sold goods for out-of-state vendors in *Scripto*.¹⁶⁹ Both AT&T and the independent contractors had a permanent presence in the taxing state and both received funds from out-of-state vendors based on sales volume within the taxing state.¹⁷⁰ However, under the Court of Appeals’s construction of *Quill*’s “common carrier exception,” independent contractors can avoid state sales and use taxes if they perform activities that are sufficiently analogous to the services offered by the U.S. Postal Service and shipping companies.¹⁷¹ This out-

162. *Gomez v. Superior Court*, 113 P.3d 41, 44 (Cal. 2005) (“Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.” (quoting CAL. CIVIL CODE § 2168 (West 2009))).

163. See Saba Ashraf, *Virtual Taxation: State Taxation of Internet and On-line Sales*, 24 FLA. ST. U. L. REV. 605, 628 (1997). Ashraf notes that, in light of changing technology, *Quill*’s bright-line presents physical presence rule is outmoded and in need of revision. *Id.* at 627. Ashraf concludes that the only way states can constitutionally impose use tax collection obligations on out-of-state Internet vendors is if Congress passes a statute to allow such taxation. *Id.* at 629.

164. See *supra* notes 151–163 and accompanying text.

165. 362 U.S. 207 (1960).

166. 488 U.S. 252 (1989).

167. See *AT&T Commc’ns of Md. v. Comptroller of the Treasury*, 950 A.2d 86, 99 (Md. 2008).

168. See *Scripto*, 362 U.S. at 210–11.

169. Compare *Scripto*, 362 U.S. at 211, with *AT&T Commc’ns of Md. v. Comptroller of the Treasury*, 2005 WL 103067, at *1–2 (Md. T.C. Jan. 3, 2005).

170. Compare *Scripto*, 362 U.S. at 211, with *AT&T Commc’ns of Md. v. Comptroller of the Treasury*, 2005 WL 103067, at *1–2 (Md. T.C. Jan. 3, 2005).

171. See *AT&T Commc’ns of Md.*, 950 A.2d at 95.

come plainly contradicts the Supreme Court's ruling in *Scripto* and invites clever lawyers to exploit this tax loophole by altering the business practices of their clients.¹⁷² Accordingly, the Court of Appeals's legal interpretation of *Quill* and the term "common carrier" blurs a bright-line rule in the area of sales and use taxes that will lead to increased litigation as more businesses alter their practices to reflect the business models of the U.S. Postal Service, interstate shipping companies, and telecommunications providers.¹⁷³

Furthermore, the Court of Appeals's construction of *Quill's* "common carrier exception" contradicts the Supreme Court's ruling in *Goldberg*, where it established that states can impose taxes on interstate telephone calls.¹⁷⁴ In *AT&T Communications of Maryland*, the Court of Appeals concluded that *Goldberg* was inapposite to the case at hand,¹⁷⁵ because under *Goldberg's* nexus requirements a state cannot tax an interstate telephone call that: (1) originates or terminates in the state, and (2) is charged or billed to an address or person located outside of the state.¹⁷⁶ The Court of Appeals explained that unlike *Goldberg*, where the carriage charge for interstate calls was assessed to in-state customers, the carriage charge in Maryland was assessed, billed, and paid for by out-of-state information vendors.¹⁷⁷ Accordingly, the Court of Appeals concluded that Maryland did not have a substantial nexus with the out-of-state information vendors.¹⁷⁸

The Court of Appeals's narrow reading of *Goldberg* loses sight of the aims of the dormant Commerce Clause by not focusing on where the interstate telephone call originates and who is the ultimate consumer of 1-900 telecommunications services.¹⁷⁹ Under the Court of Appeals's reading of *Goldberg*, no state is permitted to tax 1-900 calls that are paid for by entities located outside of the state where the call originates.¹⁸⁰ Although the Supreme Court expressed "doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call,"¹⁸¹ the Supreme Court probably did not foresee that the nexus requirements it created in *Goldberg* would lead to unreasonable outcomes that do not accord with the *Bellas Hess* physical presence rule.¹⁸² At its core, the "substantial nexus" doctrine is "a means for limiting state burdens on interstate commerce."¹⁸³ In this case, Maryland's tax on interstate 1-900 telephone calls that originate in the state and are ultimately paid for by consumers in the state does not burden inter-

172. See *id.*

173. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992).

174. See *Goldberg v. Sweet*, 488 U.S. 252, 254 (1989).

175. See *AT&T Commc'ns of Md.*, 950 A.2d at 96 n.7.

176. See *id.*

177. *Id.*

178. *Id.*

179. See *id.*

180. *Id.*

181. See *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989).

182. See *id.*

183. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992).

state commerce.¹⁸⁴ Accordingly, the Court of Appeals should not have interpreted the term “common carrier” in a way that conflicts with existing Supreme Court sales and use tax jurisprudence.

C. The Court of Appeals Ignored the Supreme Court’s Basic Framework for Analyzing Administrative Decisions on Judicial Review

In light of well-settled principles of administrative law, it is clear that the Court of Appeals misconceived the nature of its role in reviewing the Tax Court’s decision.¹⁸⁵ Although the Tax Court’s opinion rested primarily on an interpretation of state law, the Tax Court expressed uncertainty regarding the existence of a “common carrier exception” under *Quill* and federal law.¹⁸⁶ As such, the Court of Appeals should have determined whether the Tax Court’s construction of Maryland’s tax statute was “contrary to clear congressional intent” and resulted in an erroneous judgment in light of existing federal law.¹⁸⁷ By failing to examine federal law to ascertain congressional intent to exempt telecommunications companies from state taxation, the Court of Appeals impermissibly substituted the Tax Court’s reasonable interpretation of Maryland’s tax statute for its own statutory construction.¹⁸⁸

D. The Court of Appeals Should Have Declared That AT&T Is Not Exempt from Sales and Use Taxes for Selling 1-900 Telecommunications Services Under the Telecommunications Act of 1996

If the Court of Appeals had adhered to longstanding principles of judicial review of administrative decisions, it would have discovered that Congress has already established in the Telecommunications Act of 1996¹⁸⁹ that states may impose sales and use taxes on common carriers of basic “telecommunications services.”¹⁹⁰ Since the FCC has interpreted the 1996 Act as not exempting “telecommunications service providers” from state regulation, the Court of Appeals should have concluded that telecommunications companies are not “common carriers” that are exempt from

184. See *Goldberg*, 488 U.S. at 266–67.

185. See *supra* Part III.C.

186. See *AT&T Commc’ns of Md. v. Comptroller of the Treasury*, 2005 WL 103067, at *2 (Md. T.C. Jan. 3, 2005).

187. To make this determination, the Court of Appeals should have: (1) ascertained whether Congress had directly spoken on the precise question of whether telecommunications providers are exempt from state taxation; and (2) considered whether the Tax Court’s judgment was based on a permissible construction of the statute in light of federal law. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

188. See *id.* at 843.

189. See Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

190. “[T]he Communications Act does not purport to limit a state’s ability to tax.” *AT&T Commc’ns of Md., Inc. v. Comptroller of the Treasury*, 2005 WL 5582024, at *9 (Md. Cir. Ct. Sept. 30, 2005); Pub. L. No. 104-104, § 601(c)(1)–(2), 110 Stat. 56, 143–44 (1996) (codified in 47 U.S.C. § 152 note (2006)). Congress also indicated in the Internet Tax Freedom Act that telecommunications carriers engaged in telecommunications services are not exempt from state sales and use taxes. See Pub. L. No. 105-277, 118 Stat. 2615-719 (1998) (codified in 47 U.S.C. § 151 note (2006)).

use tax collection obligations within the meaning of *Quill*.¹⁹¹ Accordingly, the Court of Appeals should have concluded it had no authority to review Maryland's tax on 1-900 telecommunications services under the dormant Commerce Clause because Congress had already established that telecommunications service providers are not "common carriers" that are exempt from state sales and use taxation.¹⁹²

Even assuming that the Court of Appeals had authority to review Maryland's tax statute under the dormant Commerce Clause, AT&T's activity of selling 1-900 numbers to the public does not constitute an "information service"¹⁹³ that is exempt from state sales and use taxes under the 1996 Act.¹⁹⁴ From the customer's perspective, AT&T does nothing more than transmit a pure transmission for its customers to communicate with information vendors during 1-900 telephone calls.¹⁹⁵ No facts indicate that AT&T employs computer-processing equipment to manipulate the form or content of the information sent and received over its network during a 1-900 telephone call.¹⁹⁶ Furthermore, many courts have upheld state tax statutes that reflect the FCC's distinction between taxable telecommunications services and non-taxable information services.¹⁹⁷ Accordingly, the Court of Appeals could have alternatively concluded that AT&T is not exempt from state sales and use taxes under *Quill* because selling 1-900 telecommunications services to the public is not an "information service" that is exempt from state taxation under the 1996 Act.¹⁹⁸

VI. CONCLUSION

By holding that AT&T was a common carrier of 1-900 telecommunications services that was exempt from collecting state use taxes, the Court of Appeals committed legal error by ignoring: (1) the plain meaning of the term "common carrier" as expressed in the factual context of the *Bellas Hess* and *Quill* decisions;¹⁹⁹ (2) the Supreme Court's sales and use tax jurisprudence;²⁰⁰ and (3) well-settled principles of judicial review of administrative action.²⁰¹ Given that Congress has clearly expressed that common carriers of "telecommunications services" are not exempt

191. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973–75 (2005).

192. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

193. "Information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . ." Pub. L. No. 104-104, § 3, 110 Stat. 56, 59 (1996) (codified as 47 U.S.C. § 153(20) (2006)).

194. See *supra* Part III.D.

195. See *AT&T Commc'ns of Md. v. Comptroller of the Treasury*, 950 A.2d 86, 91 (Md. 2008).

196. See *id.*

197. Most states tax telecommunications services. See *Sales and Use Taxes: Communications Services and Electronic Commerce*, 1350 § 05 Tax Mgmt. St. Port. (BNA) 2, n.182 (2009) (listing statutes of different states that tax telecommunications services).

198. See *supra* notes 189–97 and accompanying text.

199. See *supra* Part V.A.

200. See *supra* Part V.B.

201. See *supra* Part V.C.

from state taxes under the Telecommunications Act of 1996, the Court of Appeals should have declared that AT&T is not a “common carrier” within the meaning of *Quill*.²⁰² By failing to consider whether Congress had directly spoken on the precise issue of whether telecommunications companies are exempt from state sales and use taxes, the Court of Appeals created an unreasonable “common carrier exception” under *Quill* that finds little support in federal law.²⁰³ As a result, the Court of Appeals improperly restrained the Maryland General Assembly’s power to tax 1-900 telecommunications services and imprudently decided a complex policy issue that legislators and administrative law courts are better suited to resolve.²⁰⁴

202. See *supra* Part V.D.

203. See *supra* Part V.

204. See *supra* Part V.